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 COPART INC.

UNITED STATES DISTRICT COURT
 NORTHERN DISTRICT OF CALIFORNIA
 OAKLAND DIVISION

COPART INC.,

Plaintiff,

vs.

CRUM & FORSTER INDEMNITY
 COMPANY, UNITED STATES FIRE
 INSURANCE COMPANY, and DOES 1-10,
 Inclusive,

Defendants.

Case No. C 07 2684 CW-EDL

E-FILING

**PLAINTIFF COPART INC.'S *REPLY*
 MEMORANDUM OF POINTS AND
 AUTHORITIES IN SUPPORT OF
 MOTION FOR PROTECTIVE ORDER**

Date: June 17, 2008

Time: 9:00 a.m.

Place: Courtroom E, 15th Floor

AND RELATED COUNTERCLAIM

Action Filed: March 20, 2007

Trial Date: November 10, 2008

Plaintiff Copart, Inc. ("Copart") submits the following reply memorandum of points and authorities in support of its motion for a protective order to prohibit United States Fire Insurance Company ("USFIC") from making 18 site inspections of Copart properties across California and Florida.

I. Copart Has Given USFIC More Than Enough Discovery On USFIC's Baseless Counterclaim, And Has Demonstrated Good Cause For A Protective Order.

The requested site inspections which are the subject of Copart's motion have nothing to do with the main action. Copart filed this action for breach of contract and bad faith because USFIC denied coverage under a property policy for a building in Miami, at a location called Yard 105, destroyed by Hurricane Wilma. As part of the process of obtaining and renewing insurance, Copart's broker, Marsh, would circulate specifications of requested insurance along with a Statement of Values form that listed all of Copart's locations by address and included estimates of replacement cost values of the buildings at those locations. Insurers who wished to bid quoted limits and premiums based in part on the "total insured values" set out in the Statement of Values. In October 2005, Copart accepted USFIC's bid for a \$2.5 million per occurrence "all risk" policy. That bid was based in part on a Statement of Values form that included Yard 105 as a designated location, but did not include an estimated value for the buildings at Yard 105. USFIC is using that omission to deny coverage despite the fact that there is nothing in the policy that conditions coverage on the presence of a values estimate. It was enough for coverage that Copart designated Yard 105 as a location.

Adding insult to injury, USFIC has counterclaimed against Copart alleging that Copart undervalued *all* of its properties and that USFIC would have charged more premiums if it had known that over the course of the four year contractual relationship. This is an absurd theory. The values in the Statement of Values were estimates as to what it might cost to replace a building in the event it was destroyed. They are opinions as to value and USFIC accepted them with the "spot-checking" approval of the USFIC underwriter, and issued insurance policies. See Monica Streacker Deposition Transcript p. 199:21-202:7, Reply Declaration of Eric K. Larson in Support of Motion for Protective Order, Exhibit A.

Further, USFIC made substantial money on the relationship with Copart. USFIC, however, imagines that it would have quoted and then charged a higher premium -- and that Copart would have paid that amount and not negotiated it down or taken its business elsewhere -- if the "true" values had been stated. As USFIC's counsel put it recently: "The only

1 damages being claimed are additional premiums that *would have been* collected if different
 2 values had been reported and interest and so forth.” Deposition of Monica Streaker, p.
 3 219:24-220:2 (Larson Reply Dec., Ex. A) (emphasis added). This is supposition piled upon
 4 conjecture. USFIC has resisted all requests by Copart to state some authority for its novel
 5 theory of negligent misrepresentation and “damages.”

6 That resistance continues in the opposition to Copart’s motion. USFIC casually refuses
 7 to address the legitimacy of its counterclaim in one breath (USFIC Opp., p. 8, fn. 12), while
 8 puffing up its merits in another as an attempted justification for the duplicative and
 9 burdensome discovery it seeks: “Copart does not explain why (given that U.S. Fire’s damages
 10 could be in the hundreds of thousands, if not millions of dollars) such expense is ‘undue.’”
 11 (USFIC Opp. p. 9:9-10). USFIC cannot have it both ways. USFIC has put the “merits” of its
 12 counterclaim at issue in attempting to justify these duplicative and burdensome site
 13 inspections, that has not even attempted to explain how its claim can possibly be meritorious.

14 As explained in its motion, in an effort to meet its discovery obligation in good faith
 15 and to avoid motion practice, Copart has indulged USFIC in wide and far ranging document
 16 discovery on its counterclaim that goes far beyond the matter at issue here — whether Copart is
 17 entitled to coverage for a single property in Florida damaged by Hurricane Wilma -- and
 18 provided USFIC with detailed information regarding all of its yards nationwide.

19 Further, on May 20, 2008 after the filing of this motion for protective order, Copart
 20 made available to USFIC for deposition its National Property Manager, Michael Carson.
 21 Mr. Carson reports to the CEO and is “responsible for all of Copart’s 146 American yards
 22 facilities including Canada and Alaska . . . for assisting in finding those properties, getting
 23 them zoned, getting use permits, developing the properties, constructing them, building them,
 24 refurbishing those properties and making them usable for company purposes.” Deposition of
 25 Michael Carson, 10:9-11:7, Larson Reply Dec., Ex. B. ***USFIC, however, did not ask a single***
 26 ***question of Mr. Carson regarding the properties which it now seeks to inspect.*** USFIC did
 27 not ask him to confirm any of the information regarding square footage, number of buildings,
 28 construction type, renovations done or any of the information reflected in the voluminous

documents Copart has produced. Larson Reply Decl., ¶3. To the extent those documents do not tell the complete story of Copart's properties, Mr. Carson could have filled in the blanks. USFIC, however, chose not to follow up with Mr. Carson at all.

The requested site inspections are "unreasonably cumulative and duplicative," the information sought can and has been "obtained from some other source" and USFIC "had ample opportunity to obtain the information by discovery." Schwarzer, Tashima & Wagstaffe, CAL. PRAC. GUIDE: FED. CIV. PRO. BEFORE TRIAL, ¶11:515 (The Rutter Group 2008). Good cause exists, therefore, for the protective order Copart seeks.

II. The Second Site Inspection Requests Are Further Barred By Court Order Upon The Parties' Stipulation.

As demonstrated by its failure to question Mr. Carson about these properties, USFIC is not interested in discovery with its site inspection requests; it is interested in making Copart's attempt to obtain the benefits of its property policy as expensive as possible. This attitude was clearly demonstrated when, in response to Copart's attempts to meet and confer on this issue, USFIC simply requested *more* site inspections, despite the fact that the parties agreed, and Judge Wilken ordered, that no more "requests for production/inspection" be served. Declaration of Eric K. Larson in Support of Plaintiff Copart, Inc.'s Motion for Protective Order ("Larson Dec."), Exs. C and F.

Now, USFIC goes so far as to accuse Copart's counsel of "surreptitiously" adding the word "inspection" to the Stipulation submitted. As USFIC has done before,¹ its counsel simply leaves out key pieces of correspondence that do not support its story. In response to Ms. Whitehouse's email (Whitehouse Decl. Ex. K), Copart's counsel sent a revised stipulation to include *all* Rule 34 requests (including "inspections"). Ms. Whitehouse's response? "Rick – Looks good. You may submit to the Court." Thanks – Judith." (Larson Reply Decl. Ex. C). So much for surreptition.

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¹ USFIC did the same thing on its motion to compel back in January, 2008, leaving out key correspondence from Copart's counsel in order to paint a misleading picture of the meet and confer process. Copart had to correct the record, and the Court at the hearing on that motion noted that USFIC had not adequately met and conferred. Larson Dec., Ex. J, pp. 3:21-4:1.

1 **III. USFIC Has Not Meaningfully Met Copart's Showing That The Requested Site**
 2 **Inspections Would Be Burdensome And Duplicative Of Other Avenues Of**
 3 **Discovery.**

4 USFIC does not even challenge the conservative estimate of \$63,700 in attorneys fees
 5 alone to monitor these inspections, nor adequately explain why the site inspections would
 6 reveal new or meaningful information. In its motion, Copart described the documents that it
 7 had provided to USFIC regarding the specifications of its properties and the construction
 8 completed there. USFIC states now that "the referenced documents do not show property
 9 dimensions, floor plans, construction type, construction quality, or any other features that a
 10 physical viewing would reveal." USFIC Opp. 8:12-13. This statement is largely false as
 11 demonstrated by, for example, Exhibit E to the Whitehouse Declaration. The Statement of
 12 Values provides location, square footage and construction type. To the extent this information
 13 was unclear or perceived to be incomplete, USFIC had Mr. Carson, Copart's National Property
 14 Manager, at its disposal, under oath, to testify regarding these properties. *Again, USFIC asked*
 15 *no questions about these properties at all.*

16 At pages three and four of their opposition, USFIC includes a table listing five of
 17 Copart's location with a comparison of the values estimates at two different points in time --
 18 August 5, 2005 and January 1, 2006. Presumably, these are the best examples that USFIC can
 19 muster in support of its theory that Copart concocted some nefarious scheme to underpay for
 20 insurance. That table provides no support for that theory or for the requested site inspections.

21 First, USFIC does not seek to inspect Yard 9 or 11, or even Yard 105, so the purpose of
 22 their entry in the table is unclear.

23 As for Yard 6, Copart demolished six existing buildings on that site and built a new
 24 one. The Construction Progress Report provided to USFIC reflects this construction ongoing
 25 after the August 5, 2005 Statement of Values. *See* Larson Reply Dec. Ex. D. Again, had
 26 USFIC bothered to ask Mr. Carson, he could have testified to this as well.

27 Finally, USFIC focuses primarily on Yard 34 in Tampa, Florida as an example of a
 28 yard deserving of inspection because of the "dramatic change" -- all of \$300,000 -- after
 Florida was rocked by Hurricane Wilma and construction costs soared. Mr. Carson testified in

1 general about the high cost of post-Wilma construction in Florida with respect to Yard 105
 2 (Larson Reply Dec., Ex. B) and likely would have done so with respect to Yard 34 as well --
 3 had USFIC bothered to ask him. But, it did not.

4 The necessity of inspecting any of the other 18 yards -- or why USFIC couldn't have
 5 simply asked Mr. Carson to clarify any questions the voluminous documents produced by
 6 Copart may have raised -- is left unsaid.

7 What USFIC's table does do effectively, if unwittingly, is help illustrate the
 8 counterclaim's lack of merit. USFIC attempts to ascribe some ill-motive to Copart in adjusting
 9 the values of some of its properties in January 2006 from what had been stated in August 2005.
 10 While USFIC mentions in its opposition that an endorsement was issued in response to the
 11 January 1, 2006 Statement of Values, what USFIC does not tell the Court is that *Copart paid*
 12 *USFIC additional premiums because of these adjustments*. See Deposition of Monica
 13 Streacker, p. 207:21-209:15; Ex. 100, p. POL298. Larson Reply Dec., Ex. A. Copart paid
 14 USFIC for this increase in stated values. Copart never made a claim on these yards, other than
 15 Yard 105. What is the possible damage to USFIC? USFIC continually meets this question
 16 with deafening silence.

17 Thus, while burdensome and duplicative discovery is of questionable value and
 18 propriety in any context, it is especially so here where USFIC continues to refuse to cite any
 19 authority or explain with any coherence how Copart could possibly owe it "millions of dollars"
 20 because now, years after the fact, USFIC questions the replacement cost estimates Copart
 21 provided. To frame the question is to expose the absurdity of the theory.

22 The estimates of values in the Statement of Values are not representations of fact.
 23 "Value is quintessentially a matter of opinion, not a statement of fact." *New-Visions Sports,*
 24 *Inc. v. Soren/McAdam/Bartells* (2000) 86 Cal.App.4th 303, 310. Further, USFIC's damages
 25 are illusory and speculative. It is out-of-pocket no money and, indeed, profited from the
 26 Copart policies. USFIC claims it would have charged higher premiums if Copart had reported
 27 higher values. The evidence is that reported values were only one factor in setting premiums.
 28 See Monica Streacker Deposition, p. 151:7-152:3, Larson Reply Dec., Ex. A. USFIC may

1 have charged higher premiums; it may not have. It is total conjecture. If USFIC had quoted
 2 higher premiums, Copart could have placed its insurance with another carrier. Who knows?
 3 Given the duplicative nature of the site inspection sought, the burdensomeness of the requests
 4 -- USFIC does not dispute Copart's conservative estimate of the costs it would be required to
 5 incur in attorneys' fees alone -- and USFIC's steadfast refusal to articulate a valid theory of
 6 recovery against Copart, the motion for a protective order should be granted.

7 Dated: June 3, 2008

PILLSBURY & LEVINSON, LLP

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 9 By: /s/ Eric K. Larson

Vedica Puri

Eric K. Larson

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 11 Attorneys for Plaintiff and Counterdefendant
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